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No: _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DEL A. KIDD, *Petitioner*,

v.

DEPARTMENT OF THE INTERIOR, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DEL A. KIDD,
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PETITIONER PRO SE

Date: December 9, 1993

QUESTION PRESENTED

Section 1221(e)(1) of the Whistleblower Protection Act of 1989 provides that reprisal for whistleblowing will be found if a federal employee against whom a personnel action was taken demonstrates that a disclosure described under §2302(b)(8) was a "contributing factor" in the decision to order the personnel action.

Under §1221(e)(1), is the Merit Systems Protection Board obligated to consider each and every factor that contributed to the ordering of the personnel action or may some contributing factors be ignored?

Likewise, upon appeal, is the U.S. Court of Appeals for the Federal Circuit obligated to consider all "contributing factors" in a case alleging reprisal for whistleblowing?

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References:

Federal Civil Service Law and Procedures, A Basic Guide, Second Edition: Ellen M. Bussey, Editor. *The Bureau of National Affairs, Inc.*, Washington D.C. 1990. . . . . 7, 8

Whistleblowing Protection and the Office of Special Counsel: the Development of Reprisal Law in the 1980's: Bruce D. Fong, *The American University Law Review*, Vol. 40: 1015 . . . . . .8, 10, 11

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

DEL A. KIDD, *Petitioner,*

v.

DEPARTMENT OF THE INTERIOR, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner Del A. Kidd respectfully requests that a writ of certiorari be issued to review the judgement and opinion of the United States Court of Appeals for the Federal Circuit, entered in the above-entitled proceeding on September 16, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit has not been reported. It is reprinted in the appendix hereto, p. A-1, infra. The initial decision of the administrative law judge for the Merit Systems Protection Board (MSPB) automatically became the Board's final decision pursuant to 5 C.F.R. 1201.113 (1982). The MSPB's initial decision is reprinted in the appendix hereto, pp. A-2 through A-12 infra.

JURISDICTION

Petitioner's 14-day suspension was appealed for corrective action to the Merit Systems Protection Board under 5 U.S.C. §1209 and §1221(a) and in compliance with §1214(a)(3). The administrative law judge dismissed the appeal in an initial decision dated July 3, 1991. That initial decision became the Board's final decision pursuant to 5 C.F.R. 1201.113 (1982) when the

petitioner opted to file in federal court rather than request full Board review.

Invoking federal jurisdiction under 5 U.S.C. 1221(h) and 7703(b), petitioner filed suit in the U.S. Court of Appeals for the Federal Circuit on August 22, 1991. The Federal Circuit's judgement was entered against the petitioner on July 12, 1993. A combined petition for rehearing and suggestion for rehearing en banc, timely filed by the petitioner, was denied and entered on September 16, 1993.

The jurisdiction of this Court to review the judgement of the Federal Circuit is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

5 U.S.C. "§ 1221(e)(1) of The Whistleblower Protection Act (WPA) of 1989, Pub. L. No. 101-12, 103 Stat 16 (codified as amended in scattered sections of 5 U.S.C.)

"Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board [Merit Systems Protection Board] shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant.

"(2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

STATEMENT OF THE CASE

Petitioner, Del Kidd, has been employed by the federal government since 1970 and by the Department of Interior's Bureau of Reclamation since 1983.

Beginning in March, 1988, Kidd was harassed on his job at the Yuma Projects Office (YPO). The continued harassment caused him to file two grievances against his supervisors. In processing Kidd's grievances the Bureau of Reclamation (the agency) flagrantly violated established grievance regulations and delayed the grievance proceedings.[1] When a formal hearing before the Office of Hearings and Appeals was finally scheduled in late August, 1989, Kidd suffered a fire in his home in Yuma. The fire marshall told Kidd the fire was arson. The fire and the agency's actions led Kidd to write the Secretary of the Interior on September 11, 1989, disclosing how the agency had violated specific grievance regulations and asking the Secretary to assume jurisdiction of the grievances. The letter also asked the Secretary why Kidd's supervisor, who he suspected of arson, was being defended by the agency's Solicitor in a criminal matter. (ACR p. 193)[2] Kidd sent copies of this letter to U.S. Congressmen Wayne Owens and Morris Udall. Later, on September 20, 1989, Kidd and 14 fellow YPO employees met in Kidd's home with a member of Congressman Udall's staff to report the waste, fraud, abuse of authority, and mismanagement at the YPO.

In July 1990, Kidd received a 14-day suspension without pay from his duties with the agency. The Notice of the suspension stated that Kidd was suspended primarily for repeated accusations that his former supervisor had set fire to his home.

[1] Kidd's first grievance filed on April 10, 1989 was not finally decided by the agency until May 12, 1992. In Kidd's case, a process that, by regulation, should have taken no more that 3 to 4 months took three years to complete.

[2] The Appeals Court record is cited in this petition as ACR with page references to the Appendix for Petitioner's Briefs submitted to the Court of Appeals with petitioner's reply brief. The record is referenced for the convenience of opposing attorneys.

However, the Notice listed numerous specific reasons for the suspension, including Kidd's having written his September 11th letter to the Secretary of the Interior with copies to the Congressmen, and for hosting the September 20th meeting and discussing his concerns with Congressman Udall's staff. (ACR pp. 337-341 and 354-356)

Kidd immediately filed a grievance within the agency claiming that the suspension was ordered, at least in part, as reprisal for his whistleblowing. Kidd also filed a complaint with the Office of Special Counsel (OSC). Based upon the failure of the OSC to stay the suspension or otherwise proceed, Kidd retained a lawyer and filed an appeal for corrective action before the Merit System Protection Board (MSPB) pursuant to 5 U.S.C. 1214(a)(3) and 5 U.S.C. 1209.

Kidd's appeal to the Board was based on his claim that the statements he made in his September 11th letter to the Secretary with copies to the Congressmen and the statements he made to a member of Congressman Udall's staff at the September 20th meeting were protected disclosures. Under the heading "Details of whistleblowing," Kidd's appeal states:

> "Mr. Kidd met with fourteen other government employees of the Yuma Project Office and a representative from Congressman Morris Udall's office on September 20, 1989. The topics discussed, and information disclosed, included mismanagement, violations of government regulations, and the abuse of authority at the Yuma Project Office. Disclosure of that information to the congressman's representative was protected under law. Yet, in the proposal letter, [Notice of Proposed 14-Day Suspension] the agency stated that reputations of government employees' were severely damaged when, based upon your allegations, a member of Congressman Udall's staff met with approximately 14 employees or former employees of YPO to discuss your concerns on September 20, 1989.' Mr. Kidd also attempted to bring his concerns to the Secretary of the Interior and others within the Department of

> the Interior, was chastised for doing so, and was upbraided in the Notice of Proposed Action and the action itself for doing so." (ACR p. 403)

Kidd argued to the MSPB that for the Agency to have based the 14-day suspension on such disclosures constituted a prohibited personnel practice in violation of 5. U.S.C. 2302(b)(8) of the WPA. Kidd also argued that all of his statements regarding his suspicions of arson were made in judicial proceedings in state and/or federal court and were, therefore, protected. And for the Agency to have based the 14-day suspension on such disclosures was evidence of a prohibited personnel practice in violation of §2302(b)(9), reprisal for exercising appeal rights.

Counter to Kidd's specific claims of whistleblowing, the agency claimed that the only disclosures at issue were those concerning the arson, describing the alleged whistleblowing as "alleged fire-setting misconduct of managers Pritchett and Gudgel." (ACR p. 627) The agency then argued that "making false statements which damage the reputation of others, regardless of to whom the statements are made, does not constitute protected activity." (ACR p. 432) Significantly, nowhere in its arguments to the MSPB did the Agency say or claim or supply any evidence to show that it would have taken the personnel action absent Kidd's disclosures of agency wrongdoing in his September 11th letter to the Secretary or the same disclosures made to Udall's Staff at the September 20th meeting.

A hearing was held before an administrative law judge for the MSPB on June 26, 1991. In response to the agency's inquiry during informal pre-hearing discussions, the Administrative Law Judge stated that the agency would be required to rely on all of its stated reasons for ordering the 14-day suspension. However, during the course of the hearing the judge restricted testimony to only the issue of arson. (ACR, Exhibit I: Transcript, p. 23, 25.)

The Board subsequently issued its initial decision on July 3, 1991, dismissing Kidd's appeal upon finding:

> "that the appellant is not entitled to the protection of the WPA because the disclosures he made -- accusations of arson against his supervisors and the letter he issued to prospective witnesses -- are

not protected by the Whistleblower Protection Act." See p. A-10, infra.

The decision omits any and all reference to the disclosures Kidd made at the meeting with Udall's staff person and simply ignores the fact that these disclosures were a contributing factor in the decision to order Kidd's suspension. And, with regards to Kidd's disclosures of the agency's violations of grievance regulations found in his September 11th letter to the Secretary of the Interior with copies to two Congressmen, the decision addresses only those portions of the letter concerning the arson. The decision states:

> "The appellant also argues that his communication letter to Secretary Lujan must be accorded protection 'on its face' as 1st Amendment free speech and a disclosure of a violation of the law. However, as found above, the appellant's accusations of arson are not 'protected disclosures.' And, the appellant's claim that his constitutional rights have been abridged, in and of itself, is insufficient to bring this matter within the Board's jurisdiction." See p. A-8, infra.

The decision also misstates Kidd's claim to protection under 5 U.S.C. 2302(b)(9), reprisal for having exercised his appeal rights under the law. Kidd claimed that his disclosures regarding the arson, having all been made in judicial proceedings, were protected 5 U.S.C. 2302(b)(9). The decision inaccurately states:

> "Moreover, insofar as the appellant claims that the agency is retaliating against him under 5 U.S.C. § 2302(b)(9) -- reprisal for having written this letter [the letter to the witnesses] in connection with his grievance, I disagree." See p. A-9, infra.

Neither Kidd nor the agency claimed that the contents of Kidd's April 13, 1990, letter to potential witnesses contained protected disclosures or evidenced reprisal under either §2302(b) (8) or (9).

Kidd appealed the Board's decision to the U.S. Court of Appeals for the Federal Circuit, appearing pro se. Oral arguments were not permitted. In a ruling issued July 12, 1993, the Appeals Court simply adopted the Board's narrowed

consideration of only the disclosures regarding arson and Kidd's letter to prospective witnesses and affirmed. See p. A-1, infra.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The facts of this case establish that the MSPB is willing and able to decide cases of alleged reprisal for whistleblowing without duly considering all of the factors that contribute to an agency's decision to take a personnel action against a federal employee. This case further demonstrates that the U.S. Court of Appeals for the Federal Circuit condones the Board's actions.

That being the case, this writ of certiorari to the Court of Appeals for the Federal Circuit should be granted for the following three reasons:

I.

In passing § 1221(e)(1) of the WPA, it was not the intent of Congress to allow the MSPB to ignore "contributing factors" in cases challenging personnel actions and alleging reprisal for whistleblowing.

The WPA of 1989 was intended to strengthen and improve the protection provided to federal employees and applicants who disclose wrong doing within the government by making it easier to establish reprisal.[3]

Prior to the WPA, to establish prima facie reprisal for whistleblowing under section 2302(b)(8), as well as for the exercise of appeal rights under 2302(b)(9), the following four elements had to be proved by a preponderance of evidence: (1) that the employee engaged in protected conduct; (2) that the

[3] Federal Civil Service Law and Procedures, A Basic Guide, Second Edition: Ellen M. Bussey, Editor. *The Bureau of National Affairs, Inc.*, Washington D.C. 1990, p. 128, citing Section 2(b) of the Whistleblower Protection Act, 103 Stat 16; 5 U.S.C. 1201 note.

offending official knew about the disclosure; (3) that a personnel action was taken, or failed to be take, in retaliation for the disclosure; and (4) that there was a causal connection between the protected activity and the adverse personnel action. And prima facie reprisal was established only if the protected disclosure was found to have been a significant factor in the decision to take the personnel action.[4]

Now, under the WPA, reprisal will be found if the disclosure was a "contributing factor" in the challenged personnel action.[5] Based on the explanatory discussion in the enactment history of the Act, it seems clear that this new contributing factor standard was intended to make corrective action the norm whenever a protected disclosure, alone or in conjunction with other factors, tended to affect in any way the outcome of the agency's decision to order the personnel action.[6]

The Board's decision in the instant case defies the "contributing factor" standard. For while the decision painstakingly analyzed both Kidd's disclosures of suspected arson

[4] Id., pp. 126-127, citing numerous MSPB cases.

[5] U.S.C. 1221(e)(1) (employee actions involving reprisal) and 1214(b)(4)(B)(i) (Special Counsel corrective actions).

[6] Whistleblower Protection and the Office of Special Counsel: the Development of Reprisal Law in the 1980's; Bruce D. Fong, *The American University Law Review*, Vol. 40: 1015 at 1062, citing: 135 **CONG. REC. S2779**-80 (daily ed. Mar. 16, 1989) (remarks of Sen. C., Levin) (proving retaliation requires showing disclosure was only contributing and not substantial factor); see id. at **S2781** (reprinted letter from Attorney General Thornburg to Sen. Levin, Mar, 3, 1989) (clarifying new standard as contributing factor); id. at **S2787** (remarks of Sen. W. Cohen) (whistleblowing need only be a contributing factor); id. at **S2788** (remarks of Sen. C. Grassley) (same); id. at **S2793** (remarks of Sen. D. Pryor) (contributing factor is new standard). On the House side, see 135 **CONG. REC. H747** (daily ed. Mar. 21, 1989) (remarks of Rep. S. Kursh) (agreeing to clarify word "factor" by adding "contributing"); id. at **H751** (remarks of Rep. P. Schroeder) (contributing factor means any factor that tends to affect outcome); id. at **H752** (remarks of Rep. B. Gilman) (contributing factor is new standard.)

and the contents of Kidd's letter to prospective witnesses, it omitted all reference to Kidd's disclosures that the agency had flagrantly violated grievance regulations and it ignored the fact that those disclosures were stated reasons for Kidd's suspension.

II.

The U.S. Court of Appeals for the Federal Circuit clearly errored in affirming an MSPB decision that, in this case, contradicts the WPA.

Upon appeal to the Federal Circuit, Kidd again argued that his disclosures of the agency's flagrant violation of established grievance regulations contributed to the agency's decision to order his suspension. Kidd based this argument on the fact that these disclosures were made in Kidd's September 11th letter to the Secretary, with copies to Congressmen Owens and Udall, and at the September 20th meeting in Kidd's home with a member of Congressman Udall's staff, both of which were specifically cited as reasons for ordering Kidd's suspension in the agency's letter proposing the suspension and in the Suspension Notice itself. Kidd also argued that it was wrong for the Board to have ignored these disclosures because they were contributing factors in the agency's decision.

But the Federal Circuit rejected Kidd's arguments and adopted the Boards narrowed consideration of just the disclosures concerning the arson and those contained in Kidd's letter to prospective witnesses and affirmed. Then, citing 5 U.S.C. 7703(c) (1988), the Federal Circuit went on to condone the board's action by concluding that the decision had been "issued in accordance with applicable provisions of the law" -- that is, in compliance with the WPA. See p. A-1, infra. This conclusion, likewise, defies the "contributing factor" standard established under the WPA and is plain error.

III.

If the Supreme Court does not act to enforce the "contributing factor" standard, the MSPB and the Federal Circuit will have effectively overturned the WPA and rewritten law.

The practice of ignoring contributing factors in cases alleging reprisal for whistleblowing cannot be condoned by this Court without far-reaching consequences. For the practice undermines hard fought reforms enacted by Congress in the Civil Service Reform Act (CSRA) of 1978 and the WPA.

A primary goal of the CSRA was to encourage federal employees to disclose wrongdoing within the government in order to provide the people of the United States with a more competent, honest, productive federal work force.[7]

To protect the whistleblowers, the CSRA empowered the OSC to investigate allegations of prohibited personnel practices and reprisal and to file complaints against agency officials who engaged in such conduct.[8] But as that legislation proved ineffective, the WPA was enacted to strengthen whistleblower protection.

Two significant changes to the substantive law were the deletion of the word reprisal from sections 2302(8) and (9), and the substitution of the phrase "because of." Congress made these changes in direct response to what it perceived to be the unduly restrictive decisions of the Board and the courts which had made it difficult to prove reprisal.[9]

[7] CSRA, Pub. Law 95-454, 95th Congress, 1978. 92 STAT 1111, Sections: (1),(3), & (4).

[8] Id., Section (4).

[9] Whistleblower Protection and the Office of Special Counsel: the Development of Reprisal Law in the 1980's at p. 1061. Citing S.REP. No. 413, 100th Congress. 2nd Session. 15-16 (1988) (noting Board has been overly restrictive in standards for proving reprisal.)

The Act also defined precisely the quantum of proof required to justify corrective action in cases alleging reprisal for whistleblowing. Believing that the existing law required proof that the protected disclosure be a significant or substantial factor in the action taken, Congress lowered the threshold burden of proof by establishing the "contributing factor" test.

Clearly the goals of Congress have been to better government by encouraging federal employees to disclose wrongdoing and to protect those employees who do so. And the "contributing factor" standard is essentially the linchpin for both. The CSRA enacted an elaborate scheme that purports to define, administer, and protect the rights of federal employees in the work place. The Act established the sole remedies available to federal employees whose rights have been violated by their employer, and appeal to the Board was very limited.[10]

The WPA provides a new independent right of action but only to whistleblowers alleging a violation of 2302(b)(8),[11] And as noted above, in order to prove whistleblowing, an employee must prove that his disclosures were a "contributing factor" in the agency's decision to affect the personnel action. This applies equally to an employees constitutional rights, as evidenced by the instant case. Kidd alleged to the Board that for the agency to have suspended him for having met with the staff of a Congressman and for having made disclosures of agency wrongdoing at that meeting and in a letter to the Secretary and

[10] Id. at p. 1060, citing § 1221. (Under the CSRA, only employees who had completed their one-year probationary period in the competitive service and certain veterans holding appointments in the excepted service were given the right to appeal to the MSPB. 5 U.S.C. § 7511 (1988). Even then, the right was limited to actions which were significant, i.e., removal, suspension for more than 14 days, reduction in grade, reduction in pay, and certain furlough decisions.)

[11] 5 U.S.C.A. § 1221 (West Supp. 1990) (allowing the right of action in certain reprisal cases.) See also Whistleblower Protection and Office of Special Counsel: the Development of Reprisal Law in the 1980's, at p. 1060: (The WPA of 1989 contained most of the pro-whistleblowers features of earlier proposals with the exception of authority of the Special Counsel to seek judicial review of a decision of the MSPB.)

two congressmen, violated his right to petition congress and his constitutional rights of speech and assembly. But, as the Board noted in its decision, the claim that Constitutional rights have been abridged in and of itself -- that is absent proof of being a whistleblower -- is insufficient to bring the matter within the Board's jurisdiction. See Decision, p. A-8 infra.

If the board is now allowed to ignore some factors and is not made to enforce the standard, not only will whistleblowers go unprotected and suffer reprisal but the offending officials and the wrongdoers will have nothing to fear and will go unpunished. There will then be no incentive for federal employees to disclose official government wrongdoing, and reprisal against those employees who do blow the whistle will be open and unchecked. But, most important, by simply ignoring the "contributing factor" standard the Board and the Federal Circuit will have effectively rewritten the law and defeated its purpose.

Pursuant to specific provisions of the CSRA, virtually all federal whistleblowing cases pass through the Board and the Ninth Circuit. This system forecloses any traditional "percolation" among the circuits of federal whistleblower issues like the one presented here. And the fact that not all Board decisions are appealable further forecloses the possibility of traditional "ripening" of whistleblower issues.

CONCLUSION

Only review by the Supreme Court will correct the issue presented here. And so, for the reasons argued above, the petitioner respectfully asks that this petition for writ of certiorari to the Federal Circuit be granted. Or, in the alternative, the petitioner asks that the Supreme Court summarily reverse the Board's decision in this case.

APPENDIX

NOTE: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

91-3546

DEL A. KIDD,

Petitioner,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

DECIDED: July 12, 1993

Before MAYER, MICHEL, AND LOURIE, Circuit Judges.
PER CURIAM.

Del A. Kidd appeals the July 3, 1991, decision of the Merit Systems Protection Board, No. DE122191W0210, finding that he was not entitled to protection under the Whistleblower Protection Act of 1989. We affirm.

Kidd alleged before the board that his 14-day suspension was an act of reprisal for two disclosures about his supervisors. First, he alleged to several sources that they were involved in an arson on his property, and second, he wrote a letter to prospective witnesses in a grievance action against his supervisor which warned that the witnesses may also be subject to harassment by the supervisors. The board found that neither of these allegations constituted protected disclosures under 5 U.S.C. § 1221(e)(1). We conclude that the board's decision was not arbitrary or capricious, was supported by substantial evidence, and was issued in accordance with applicable provisions of the law. See 5 U.S.C. § 7703 (c) (1988).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER REGIONAL OFFICE

DEL A. KIDD Appellant, v. DEPARTMENT OF THE INTERIOR, Agency.	)	DOCKET NO. DE122191W0210 DATE: JULY 3, 1991

Jerre Dixon, Esquire, Dixon & Snow, Denver Colorado, for the appellant.

Bob Moeller, Esquire, Phoenix, Arizona, for the agency.

Before

Steven L. Chaffin
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant seeks Board review of his 14-day suspension, effective July 16, 1990. See Appeal Record, Tabs 1 and 4-41. The appellant asserts Board jurisdiction over the matter appealed by claiming the protection of the Whistleblower Protection Act of 1989.

The appellant was given the opportunity to present evidence and argument on the issue of whether he was a whistleblower under 5 U.S.C. § 2302(b)(8). And, because of

allegations made by the appellant, a hearing was held on June 26, 1991. The appeal record closed upon the completion of the hearing.

For the reasons stated below, I find that the appellant is not a whistleblower and I DISMISS the appeal of his 14-day suspension.

ANALYSIS AND FINDINGS

Factual Background

Most of the facts of this case are undisputed. See Appeal Record, Tab 21 (Stipulated Facts). The appellant served in the position of Environmental Specialist, GS-12, in the Lower Colorado Division of the Bureau of Reclamation. On July 16, 1990, the appellant was suspended for 14 days for repeatedly accusing his former supervisor - - Ray [sic] Pritchett - - of setting fire to the appellant's home on August 26, 1989, and for writing a letter to prospective witnesses on April 13, 1990.

These accusations, as set forth in the notice of proposed removal, first occurred on the night of the fire, August 26, 1989. See Appeal Record, Tab 4-4M. Then, on the next Monday morning, August 28, the appellant and his wife secured injunctions against Pritchett and David Gudgel -- the appellant's second line supervisor -- in the Yuma, Arizona, Municipal Court.[1] These injunctions indicated that Pritchett and Gudgel were to stop all acts of intimidation, threats, bodily harm, or acts causing property damage. See Appeal Record, Tab 5-4AA. The injunction also noted the fire at the appellant's house and stated a belief that Pritchett was capable of such arson.

Then, on September 11, 1989, the appellant wrote a letter to Manuel Lujan, Secretary of the Interior. See Appeal Record, Tab 5-4Y. In that letter, the appellant indicates that he suspected Pritchett and Gudgel of starting the fire at his house on August 26, 1989.

[1] These injunctions were obtained ex parte and without a hearing. Thus, I do not consider the granting of the injunctions by the Yuma Municipal Court to be probative evidence that the allegations contained therein in support of the injunction were true.

In March of 1990, the appellant sought a renewal of the injunction against Pritchett and Gudgel. In seeking this renewal the appellant raised the same accusations against the two individuals.

Finally, the notice of proposed suspension cites an April 13, 1990, letter the appellant wrote to 30 prospective witnesses for a grievance hearing.[2] That letter, noting the withdrawal of the grievance, suggests that the witnesses might also be subject to harassment by Pritchett and Gudgel. See Appeal Record, Tab 4-4Q.

Other, less germane facts, are also undisputed. The appellant had difficulty working under Pritchett's supervision for several years. During this period, reprimands were issued, grievances filed, and hearings held. This series of events presumably ended in July of 1989, when the appellant was reassigned from the agency's Yuma, Arizona office to the agency's Boulder City, Nevada Office.[3] This reassignment occurred approximately three weeks before the fire at the appellant's Yuma residence.

In 1990, the appellant sought review of his suspension by the Office of Special Counsel (OSC). However, on January 2, 1991, the OSC notified the appellant that it would take no further action on his complaint. The appellant was informed of his right to seek corrective action from the Board, and did so on March 7, 1991.

Applicable law

In order to establish a claim of retaliation for

[2] The parties are in agreement that the letter was erroneously dated March 13, 1990, and should have been dated April 13, 1990.

[3] It is undisputed that all of the "personnel actions" leading up to the appellant's reassignment, including the reassignment itself, were effected or proposed prior to July 9, 1989, the effective date of the Whistleblower Protection Act. Thus, they are not subject to review here under that Act. See Herring V. Department of the Treasury, 44 M.S.P.R. 673, 675 (1990), aff'd 918 F.2d 186 (Fed. Cir. 1990) (Table); Marshall v. Department of Veterans Affairs, 44 M.S.P.R. 28, 31-33 (1990).

whistleblowing, an employee must show that he made a protected disclosure and that the disclosure was a "contributing factor" in the agency's decision to effect the personnel action. See 5 U.S.C. §1221(e)(1); *Christopher v. Defense Logistics Agency*, 44 M.S.P.,R. 264, 271 (1990); *Gergick v. General Services Administration*, 43 M.S.P.R. 651, 569 (1990). Here, there can be no disagreement that the appellant's disclosures were a contributing factor in his 14-day suspension: the suspension action was specifically taken for those disclosures.[4] Thus, the issue before me is whether the appellant's disclosures as set forth in the notice of proposed suspension were "protected" disclosures under the Whistleblower Protection Act of 1989.

Analysis

The agency's suspension action can be divided into two parts. The first part relies on the appellant's repeated accusations of arson against Pritchett and Gudgel. Specifically, these accusations occurred on August 26, 1989 - - the night of the fire - - to police and fire officials; on the Monday following the fire in the request for a court injunction; in the September 11, 1989 letter to Secretary Manuel Lujan; and in March 1990, when the appellant sought to renew the injunctions against Pritchett and Gudgel.

The second part of the agency's suspension action involves the appellant's letter dated April 13, to prospective witnesses. The issuance of this letter raises different issues and will be discussed later.

The central issue with regard to these accusations of arson against Pritchett and Gudgel is whether they constitute a violation of the law and whether the appellant reasonably believed he was reporting such a violation. Seed 5 U.S.C. § 2302(b)(8). The test for such "reasonable belief" is not the subjective belief of the

[4] The appellant cites earlier protected disclosures with regard to his several grievances with the agency. However, the appellant presented no evidence to show that these earlier disclosures were a contributing factor in the agency's decision to suspend ;him for 14 days. Moreover, it is not clear that the disclosures made are of the type which can be considered protected.

appellant/discloser. Rather, it is whether a "reasonable person in the appellant's position would believe that the matter reported was protected. See *Special Counsel V. Hoban*, 24 M.S.P.R. 154, 160 (1984).[5]

Thus, the instant case must be examined not from the appellant's perspective, but from the perspective of a reasonable person, confronted with the appellant's circumstances and the evidence available to the appellant. And, based on the evidence presented, I find that a reasonable person could not have "reasonably believed" the accusations made.

To support his accusations, the appellant first alludes to a conversation he had with several fellow employees some 18 months before the fire. See Hearing Tape (the appellant's testimony). During this conversation which involved Pritchett's alleged harassment, one of the fellow employees stated that Pritchett would stop at nothing, even burning a residence, to harass employees. See Id.

This statement, according to the appellant, formed the basis for his belief that Pritchett had committed arson. Yet, this fellow employee apparently did not provide any factual basis to support his supposition; it was apparently nothing more than an unsubstantiated opinion.

Moreover, as noted, while the appellant and Pritchett had been having difficulties in the workplace, no evidence has been produced to show that these difficulties ever occurred outside the workplace. That is, even assuming arguendo that Pritchett harassed the appellant, and I do not make this assumption, the appellant has presented no evidence to show that Pritchett has ever said or done anything to suggest that he was capable of such activities outside the mantle of work supervision.

The appellant next justifies his accusations by asserting that he was only cooperating with law enforcement officials. That is, the appellant claims that on the night of the fire, both the Fire Marshall and the investigating police officer suggested that the

[5] I note that this case was issued prior to the Whistleblower Protection Act of 1989. However, the language of the statute requiring that the employee "reasonable believe" his disclosure is unchanged by the Act.

fire was arson and asked for the names of suspects. Thus, the appellant was only complying with these law enforcement officials by providing his supervisors' names.

However, while the appellant testified that he was asked to provide such information, he has submitted no evidence to show that the Fire Marshall or the Police Officer ever asked for such information on the night of the fire.[6]

In fact, the final police report indicates that the fire was due to "unknown" causes.[7] See Appeal Record, Tab 5-4AB. And, the report of the investigating police officer suggests that the appellant first raised the specter of arson, and that the appellant and his wife suggested that Pritchett and Gudgel might be involved. See Id.

More importantly, I note that the available evidence provided at least one alternative to arson and should have suggested caution to the appellant in making his accusations. First, the appellant had recently been reassigned from Yuma, Arizona, to Boulder City, Nevada. Thus, the appellant was no longer living in his former Yuma residence -- his daughter was -- and the evidence shows that Pritchett was not even aware of the appellant's presence in Yuma on the night of the fire. See Id.

Further, on the day of the fire, the appellant's son-in-law had cleaned the storage room where the fire started. Se Id; see also Hearing Tape (testimony of Judy Kidd). This cleaning involved the stacking of paint and other combustible materials. While these chemicals were ultimately found not to be the cause of the fire, the possibility of such an occurrence was extant at the time of the fire.

I am also disturbed by the fact that on the Monday after

[6] I note that the parties stipulated that the Fire Marshall found that the fire was arson. However, I am unable to find any evidence of this in the appeal record. Nor was I able to find any record of the appellant's conversation with the Fire Marshall on the night of the fire.

[7] During his testimony, the appellant indicated that insofar as the fire was arson, he had become the prime suspect because of certain discrepancies in his story and that he was deemed to have failed a lie detector test on the matter. See Hearing Tape (the appellant's testimony).

the fire, and then some two weeks later when he wrote to Secretary Lujan, the appellant repeated his charge of arson without any apparent attempt to check with the police or fire department to ascertain the development of evidence. In fact, the appellant stated that he had been unable to secure a copy of the police report and did not see one until provided by the agency in its adverse action file. See Hearing Tape (the appellant and Judy Kidd's testimony). I note, however, that the agency was able to obtain a report of investigation without any apparent difficulty.

Having reviewed the appeal file and specifically the appellant's testimony at the hearing, I find not one scintilla of credible, probative evidence available either now or at the time of the fire, which would suggest that Pritchett and/or Gudgel were involved in the fire at the appellant's home. Thus, I find that a reasonable person could not have reasonably believed that Pritchett and Gudgel had started the fire at the appellant's home. As suggested by the agency in its closing argument, the appellant's statements appear to be unfounded suspicions rather than a reasonable belief.

Accordingly, I conclude that the appellant's accusations against Pritchett and Gudgel in this regard are not "protected disclosures" within the coverage of the Whistleblower Protection Act. And, because of this conclusion, I make no finding on whether the appellant's accusations were in the public interest -- those types of disclosures Congress intended to protect through the Act -- or solely in his private interest. See *Berube v. General Services Administration*, 30 M.S.P.R. 581, 596 (1986) vacated on other grounds, 820 F.2d 396 (Fed. Cir, 1987).

The appellant also argues that his communication letter to secretary must be accorded protection "on its face" as 1st Amendment free speech and a disclosure of a violation of the law. However, as found above, the appellant's accusations of arson are not "protected disclosures." and, the appellant's claim that his constitutional rights have been abridged, in and of itself, is insufficient to bring this matter within the Board's jurisdiction. See *Sanders V. Merit System Protection Board*, 757 F.2d 1288, 1290 (Fed, Cir. 1985) (the Board does not have plenary jurisdiction.)

The final basis for the 14-day suspension is the appellant's

letter to approximately 30 fellow employees who were to appear as witnesses at this grievance hearing. See Appeal Record, Tab 4-4Q. In that grievance the appellant was attempting to show that he was being harassed. However, on the second day of the hearing, before calling many of the requested witnesses to testify, the appellant withdrew the claim of harassment.[8] See Appeal Record, Tab 5-4R (Vol. 3 of the grievance transcript, pg. 130). Yet, he still wrote to these individuals to outline his continuing plans and to warn the employees of potential harassment.

Having reviewed this letter, I do not believe it contains a protected disclosure. See Appeal Record, Tab 4-4Q. Rather, the appellant is complaining of the agency's alleged harassment toward him rather than any disclosure of specific mismanagement. Nothing the appellant disclosed in this letter effectuated the purposes of 5 U.S.C. § 2302(b)(8). See *Berube*, 30 M.S.P.R. at 586. That is, any disclosures made involved only the furtherance of the appellant's case, not the public interest. Thus, I find that they were not protected disclosures. See *Williams V. Department of Defence*, 46 M.S.P.R. 549, 533-54 (1991); *Oliver V. Department of Health and Human Services*, 34 M.S.P.R. 465, 472 (1987), aff'd 847 F.2d 842 (Fed. Cir. 1988) (Table)..

Moreover, insofar as the appellant claims that the agency is retaliating against him under 5 U.S.c. §2302(b)(9) -- reprisal for having written this letter in connection with this grievance, I disagree. The credible evidence of record shows that at the time the appellant wrote these letters he had withdrawn his grievance. Moreover, as with the appellant's constitutional claim, the allegation that the agency has committed a prohibited personnel practice is insufficient to bring this matter within Board jurisdiction. See *Hunter V. Department of the Army*, 40 .S.P.R. 449, 451 (1989).

Finally, I note that the appellant alleges that the agency's actions against him constitute age discrimination. While it is not clear that the appellant is specifically raising this argument with

[8] The parties stipulate to this matter but essentially agreed to disagree. My reading of the hearing transcript convinces me that the agency's position -- the appellant withdrew the claim of harassment -- is the correct one. See Appeal Record, Tabes 5-4R and 21.

regard to his 14-day suspension, I would simply note that the Board lacks jurisdiction over such an allegation in the absente of an appealable matter. See *Perlmutter v. Department of the Air Force*, 41 M.S.P.R. 38 (1989). Thus, because the Board does not have jurisdiction over the appellant's 14-day suspension, or any of the other personnel actions taken against the appellant, it cannot consider this allegation of discrimination.

Summary and conclusion

In sum, I find that the appellant is not entitled to the protection of the Whistleblower Protection Act because the disclosures he made -- accusations of arson against his supervisors and the letter he issued to prospective witnesses -- are not protected by the Whistleblower Protection Act. That is, the appellant could not have "reasonably believed" the accusations of arson, and the letter he wrote to prospective witnesses was in his personal interest, not the public interest.

Further, the appellant's 14-day suspension, standing alone, is not an agency personnel action over which the Board has jurisdiction. See 5 U.S.C. § 7512(2); *Gosa V. United States Postal Service*, 43 M.S.P.R. 11, 13 (1989). The appellant's suspension was reviewed only because of his allegation that the personnel action was in retaliation for his whistleblowing activity. However, having found that the appellant is not a whistleblower, the appeal must be deemed as outside the Board's subject matter jurisdiction.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Steven L. Chaffin
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on Aug. 7, 1991, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you with to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.